In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1705

CALIFORNIA MILK PRODUCERS ADVISORY BOARD
and CUNNINGHAM & WALSH, INC.,
Petitioners,

vs.

THE FEDERAL TRADE COMMISSION, LOUIS A. ENGMAN,
PAUL RAND DIXON, MAYO J. THOMPSON, STEPHEN
NYE, M. ELIZABETH HANFORD and
DANIEL J. HANSCOM,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioners, the California Milk Producers Advisory Board and Cunningham & Walsh, Inc. (plaintiffs below), respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled matter on March 3, 1977. This case presents an issue of first impression before this Court: Whether the States, and their officers, agencies and

instrumentalities are subject to the jurisdiction of the Federal Trade Commission. The decision of the court below, if allowed to stand, will unjustifiably postpone adjudication of this vital issue for several years and foster substantial unnecessary litigation between the Federal Trade Commission and various States. Comity and judicial economy both support prompt adjudication of this case without the requirement of exhaustion of administrative remedies.

OPINIONS OF THE COURTS BELOW

An unreported decision of the United States District Court for the Northern District of California, District Judge Robert H. Schnacke presiding, was filed on June 24, 1975. That decision, captioned Findings of Fact and Conclusions of Law, is attached as Appendix B and the Judgment of the District Court is attached as Appendix C to this Petition.

On March 3, 1977, the United States Court of Appeals for the Ninth Circuit vacated the District Court's judgment with directions to dismiss for failure to exhaust administrative remedies before the Federal Trade Commission (hereafter "FTC"). The Opinion of the Court of Appeals is reported at 549 F.2d 1321 (9th Cir. 1977) and is attached as Appendix A to this Petition.

JURISDICTION

The Judgment of the Court of Appeals was entered on March 3, 1977 and the issuance of its Mandate

stayed to permit the filing of this Petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is exhaustion of administrative remedies necessary before a State and an instrumentality of the State can challenge the existence *vel non* of FTC jurisdiction over them where that challenge presents a pure question of statutory interpretation?

2. Is any legitimate interest promoted by the requirement of exhaustion when the FTC has already determined the issue of its jurisdiction against the petitioners?

3. Is a State a "person, partnership or corporation" within the meaning of the Federal Trade Commission Act so as to render the States, and their agencies, officers and instrumentalities subject to the jurisdiction of the FTC?

STATUTES INVOLVED

The resolution of this case turns upon interpretation of Sections 5 and 12 of the Federal Trade Commission Act (15 U.S.C. §§ 45 and 52) in light of this Court's decisions in *Parker v. Brown,* 317 U.S. 341 (1943); *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975); and *Cantor v. Detroit Edison Company,* ..... U.S. ....., 49 L.Ed.2d 1141 (1976). Those sections, as amended, are set forth in Appendix D to this Petition.

STATEMENT OF THE CASE

On August 1, 1974, following a two year investigation and extensive efforts by petitioners to resolve this dispute without litigation, the FTC issued an Administrative Complaint naming as respondents the California Milk Producers Advisory Board (hereafter the "Board") and Cunningham & Waish, Inc. (hereafter "C&W"). Neither the State of California nor the Director of Food and Agriculture were named by the FTC despite repeated advice by petitioners and by the State Attorney General's office that the State of California was the real party in interest under the California statutory framework. That Complaint challenged an advertising campaign promoting the sale of fluid milk promulgated by the California Director of Food and Agriculture (hereafter the "Director") pursuant to a state Marketing Order, on the grounds that the advertising campaign's use of the slogans "Everybody Needs Milk" and "Milk Has Something for Everybody" were deceptive.[1]

On September 11, 1974, the present action was filed by the State of California, on behalf of the Director, joined by the Board and C&W, to obtain an injunction against further administrative proceedings and a

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[1]Use of the former slogan was voluntarily discontinued in December 1972 after questions concerning its accuracy were raised. Use of the latter slogan had also been discontinued before the Administrative Complaint was filed.

declaratory judgment that the FTC lacked jurisdiction, under the Federal Trade Commission Act (hereafter "FTC Act") over the State of California, its agents, instrumentalities and officers.

The California Marketing Act of 1937[2] was enacted to provide for the "maintenance of present markets", to "eliminate or reduce economic waste in the marketing of commodities" and to "restore and maintain adequate purchasing power" for agricultural producers. (Cal. Agri. § 58654). These objectives were to be achieved through the issuance and implementation by the Director, a constitutional officer of the State, of marketing orders for specific agricultural products. (Cal. Agri. § 58741). Such an order may provide for research, educational programs (Cal. Agri. § 58893) and promotional programs, including advertising and sales promotion (Cal. Agri. § 58889).

A marketing order is issued by the Director following public hearings and findings that a proposed order will further the objectives of the Marketing Act. (Cal. Agri. § 58813). After such findings are made the order is submitted to affected producers for their approval. If a sufficient percentage of producers approve the order, it is issued and enforced by the Director. (Cal. Agri. §§ 58991, 58993, 58996).

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[2]California Food and Agriculture Code, Sections 58601-59293 (hereafter "Cal. Agri. §____").

The Marketing Act provides for the creation of an advisory board "to assist the Director in the administration of" the marketing order. All members of such boards are appointed by, and serve at the pleasure of, the Director. (Cal. Agri. §§ 58841-58842). They may administer the order, "subject to the approval of the Director". (Cal. Agri. § 58846). The Board may recommend administrative rules and regulations, report complaints regarding violations of the order and recommend amendments of the order for the consideration of the Directors. It may assist the Director in the imposition and collection of assessments and in processing information which the Director requires for administration of the order. *(Ibid.)*. Finally, the Board is authorized to enter into contracts on behalf of, and subject to the approval of, the Director to implement the Marketing Order. (Cal. Agri. § 58845). This statutory framework limits the power to the advisory boards to that of aiding, advising and recommending action. All nations directed at implementation of the marketing order are those of the California Director of Food and Agriculture.[3]

Pursuant to this legislative mandate, the Director issued a Marketing Order for milk products in October 1969 which resulted in the creation of the Milk Producers Advisory Board. The Board then entered

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[3]If this description of the California agricultural marketing program appears familiar, it is due to the virtual identity of this program to the prorate program involved in the case of *Parker v. Brown, supra*, and there held to constitute state action not subject to the Sherman Act.

into a contract, in the name of the Director, with C&W to provide professional services in connection with its proposed promotional program designed to increase consumption of milk within California. The advertising materials created by C&W are submitted to the Director for his approval and, on occasion, have been rejected by the Director. (See Appendix B at xi-xii). It was this promotional program which was attacked by the FTC.

After Hearing, the District Court entered a preliminary injunction against further administrative proceedings pending resolution of the jurisdictional issue. The parties then filed cross motions for summary judgment supported by extensive briefs and affidavits. The court denied the FTC's motion and granted summary judgment to the State of California, the Board and C&W. The court found the following facts "established and undisputed":

> "5. The California Milk Producers Advisory Board is an instrumentality of the State of California established to assist and advise the Director of Food and Agriculture in fulfilling his statutory duties under the California Marketing Act of 1937. *The Director of Food and Agriculture and the State of California are the real parties in interest herein.* The advertising being challenged by the FTC in Docket No. 8988 is part of the marketing order of October 8, 1969, effectuated by the Director of Food and Agriculture, pursuant to the California Marketing Act of 1937, which specifically authorizes such advertising." (Appendix B at xi; emphasis added).

The court held that neither the language nor the legislative history of the FTC Act justified the FTC's attempt to exercise jurisdiction over the conduct of the states, state agencies, state instrumentalities or state officers acting in their official capacity. Due to the close relationship between the Sherman Act and the FCT Act, the court held that exclusion of state action from the Sherman Act "indicates that it is not subject to the FTC Act either." (Appendix B at xiii). Finally, the court held that requiring exhaustion of administrative remedies would be inappropriate because:

> "The FTC here clearly lacks jurisdiction under the FTC Act over the State and the other plaintiffs, and there is no specialized administrative understanding required to determine that this is so, such as would be required to decide, for example, the factual question of whether a private entity was engaged in interstate commerce; this case involves only a question of statutory construction." (Appendix B at xiv).

The Court of Appeals refused to reach the merits of the jurisdiction issue. Although it recognized that the question of the applicability of *Parker v. Brown* antitrust immunity to deceptive advertising proceedings "is strictly one of statutory interpretation" (Appendix A at vii), it ruled that petitioners are required to exhaust administrative remedies before the FTC. The court vacated the permanent injunction entered by the District Court and remanded with directions to dismiss. (Appendix A at viii).

REASONS FOR GRANTING THE WRIT

Petitioners respectfully urge that this case raises an issue of first impression concerning the relations between the Federal and State levels of government which mandates prompt determination. The clarity of the jurisdictional issue, the absence of administrative discretion or expertise in this area of statutory interpretation, and due regard for the proper balance of Federal and State interests in this area justify rejection of the exhaustion requirement and immediate and final adjudication.

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT

The question of the extent to which Federal trade regulation policies are applicable to the conduct of states and their agencies or to private parties claiming to be operating under the direction or approval of state agencies has recently been given substantial attention by this Court. In *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975) and *Cantor v. Detroit Edison Company,* ..... U.S. ....., 49 L.Ed.2d 1141 (1976) this Court ruled that for private parties to successfully assert "state action" immunity they must establish two facts. First, that private conduct is dictated by a state law or regulation, i.e., the private party has no freedom of choice either in the initiation or enforcement of the law or regulation. *Cantor v. Detroit Edison Company, supra,* ..... U.S.

....., 49 L.Ed.2d, at 1150-52. Second, that the state imposed restraint was "necessary in order to make the regulatory act work." *Id.*, 49 L.Ed.2d, at 1153-54. The resolution of a claim to state action exemption by a private person or corporation consequently turns upon resolution of complex factual issues. Where, as here, the State itself is the actor, this factual inquiry becomes unnecessary.

Although there was substantial disagreement expressed in the several opinions in *Cantor* concerning the outer boundaries of the "state action" exemption, there seemed to be unanimous agreement to the proposition that *Parker v. Brown,* 317 U.S. 341 (1943) at the very least immunized the States, their agencies and officers from Sherman Act liability. Two cases which test this proposition have been granted a hearing by the Court this term. *Bates v. State Bar of Arizona,* (No. 76-316; Probable Jurisdiction Noted October 4, 1976, ... U.S. ....., 50 L.Ed.2d 73), raises the application of the Sherman Act to disciplinary proceedings in the Arizona Supreme Court to enforce a state bar prohibition against attorney advertising. The second case, *City of Lafayette, Louisiana v. Louisiana Power & Light Company* (No. 76-864; Petition Granted March 28, 1977, 45 U.S.L.W. 3647), raises the question whether the Sherman Act can ever apply to the actions of political subdivisions of the states. Prompt resolution of the issues raised in those cases is clearly warranted by the present uncertainty as to the scope of the state action immunity.

Immediate resolution of the question raised in the present case concerning FTC jurisdiction over the

States and their agencies and officers is even more compelling. Conduct arguably violative of the Sherman Act has become crystalized by years of precedent into specific practices permitting a high degree of predictability of legal consequences. The Federal Trade Commission Act, on the other hand, is open ended. In its enforcement of the prohibition of "unfair or deceptive acts and practices" the FTC is authorized to prevent trade restraints in their incipiency, *F.T.C. v. Cement Institute,* 333 U.S. 683, 693-94 (1948), and reach conduct not covered by either "the letter or the spirit of the antitrust laws". *F.T.C. v. Sperry & Hutchinson Co.,* 405 U.S. 233, 239 (1972). Additionally, the FTC has extensive investigative and rule making powers which presumably would be enforceable against the States. The degree to which legitimate state activities would be disrupted by the exercise of the jurisdiction which the FTC now claims, in itself, dictates rejection of that claim and justifies a prompt decision by this Court.

Such rejection is also required by this doctrine of federal-state comity—defined by Mr. Justice Black in *Younger v. Harris,* 401 U.S. 37, at 44 (1971) as:

> ". . . a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways . . . a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Govern-

> ment, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

The balancing of these conflicting interests and resolution of this dispute have been indefinitely postponed by the Court of Appeals' requirement of exhaustion. Yet decisions of this Court and of lower federal courts indicate that where resolution of jurisdictional or coverage issues depend upon *status*, rather than practices or conduct, exhaustion is unnecessary. *Leedom v. Kyne*, 358 U.S. 184 (1958); *McKart v. United States*, 395 U.S. 185 (1969); *F.T.C. v. Miller*, 549 F.2d 452 (7th Cir. 1977). Thus, the doctrine of exhaustion is not jurisdictional, its application calls for the exercise of sound judicial discretion. *NLRB v. Shipbuilding Local 22*, 391 U.S. 418, 426 n. 8 (1969). Its purpose is to permit the making of a factual record, the exercise of administrative discretion and expertise and to promote judicial and administrative efficiency. *United States v. McKart*, *supra*, 395 U.S. at 193-194. In cases where administrative jurisdiction or consequences depend upon the status or identity of the parties none of these factors are applicable or relevant.

In *McKart*, the Court rejected the requirement of exhaustion where the sole issue was one of statutory construction—whether the defendant was a "sole surviving son" under the Selective Service Act. As explained in the later case of *McGee v. United States*, 402 U.S. 479, at 485 (1971):

> "In the *McKart* case, the focal interest for purposes of analysis was the interest in allowing the agency 'to make a factual record, or to exercise its discretion or apply its expertise.' There the registrant had failed to take an administrative appeal from the local board's denial of 'sole surviving son' status. Later the issue of McKart's entitlement to that exempt status arose in a criminal context, and the Court held that the claim should be heard as a defense to liability despite the failure to exhaust. The validity of the claim was a question 'solely . . . of statutory interpretation.' Id., at 197-198, 23 L Ed 2d at 205. McKart's failure to exhaust did not inhibit the making of an administrative record—all the relevant facts had been presented. Id., at 198 n. 15, 23 L Ed 2d at 206. The issue was not one of fact and thus its resolution would not have been aided by the exercise of special administrative expertise; and proper interpretation of the statutory provision in question was not a matter for agency discretion."

This reasoning was followed in *F.T.C. v. Miller, supra,* where the court ruled that a company served with a subpoena by the FTC could challenge the jurisdiction of the Commission in an enforcement proceeding—without the requirement of exhaustion. The respondent was a common carrier claiming to be statutorily exempt from FTC jurisdiction as a "common carrier subject to the Acts to regulate commerce". The court ruled that exemption to depend upon the status of the respondent rather than its activities and once its character as a "common carrier" was established "the issue is the purely legal one of whether

or not any corporation within that category may be subjected to agency investigation". (549 F.2d at 461). The same test is applicable here. Administrative expertise is totally unnecessary to determine whether or not a state is a "person, partnership or corporation" within the statutory language of the FTC Act.

In addition to the clarity of the jurisdictional issue and the pure question of law presented, exhaustion of administrative remedies would be futile for two reasons. First, the Commission has already determined the question against petitioners. In its opening Brief for Appellants in the Court of Appeals, the Commission filed thirty pages of argument in support of he contention that "The Deceptive Advertising and Unfair and Deceptive Practices Jurisdiction of the Federal Trade Commission Extends to Advisory Boards Organized in Accordance with State Agricultural Marketing Orders". Despite sixty years of administrative inaction, the FTC categorically claimed jurisdiction over the trade practices of the States:

> "While the application of the FTC Act to states as such has never been adjudicated, under well-established principles of federalism, the Commission's plenary power extends to such trade practices undertaken by a sovereign state." (Brief for Appellants, at 27).

A full record on this issue was made before the District Court and further proceedings in the FTC will not significantly alter that record. Under these circumstances, exhaustion of remedies will be counterproductive and wasteful. *See, Weinberger v. Salfi,* 422 U.S. 749, 765 (1975).

Second, although the Commission seeks to exert jurisdiction over the States and their agencies and officers, it has deliberately refrained from actually naming the State of California or the Director of Food and Agriculture. This constitutes a failure to name indispensable parties which will preclude entry of ANY valid order in the agency proceeding. *Sherman v. United States,* 282 U.S. 25 (1930); *see, United States v. California,* 297 U.S. 186 (1936). No administrative hearing is necessary to establish the absence of indispensable parties, nor capable of curing this defect. Exhaustion is therefore a wasteful exercise in futility.

Recent developments highlight the tremendous waste of judicial and administrative resources which the requirement of exhaustion in this case will generate. Thus, the Court may take judicial notice of a unanimous decision of the Commission to commence a formal investigation of the milk pricing laws and practices of the States, publicly announced on April 27, 1977. That public release identified twenty-one separate States, whose price setting or posting regulations would be subjected to FTC investigation. It is highly probable that every one of those States will challenge any formal attempt of the Commission to exert administrative jurisdiction over their practices. Those challenges will compound and multiply the judicial and administrative expense of resolving the clear legal issue raised by, and so ripe for determination in, the present case.

A final ground for rejection of exhaustion in this case is found in this Court's decision of *McCulloch*

v. Sociedad National de Marineros de Honduras, 372 U.S. 10, at 17 (1963) where significant questions of foreign policy were affected by the exercise of agency jurisdiction. In rejecting the requirement of exhaustion the Court stated:

> " . . . the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's powers." (372 U.S. at 17).

Granted that the present case raises no foreign policy problem, however, a comparable question equally high in the scale of national interest is presented by the question of FTC jurisdiction over the States, their agencies and instrumentalities. Federalism depends upon cooperation rather than confrontation; prompt resolution of disputes between the national and local levels of government is a matter of the utmost importance. Disruption of the federal-state balance should only be tolerated where clearly mandated by Congress; the courts rather than the administrative agencies are competent to finally determine the Congressional will. Delay in the resolution of such conflicts serves only to harm the operations of both levels of government to the detriment of the public interest.

CONCLUSION

For these reasons, petitioners respectfully submit that Court of Appeals was wrong in refusing to decide the jurisdictional issue raised by this case at this time, and pray that a writ of certiorari issue to review and correct that error or, alternatively, remand this case to the Court of Appeals with directions for that court to consider and decide the question of the jurisdiction of the FTC over the States and their agencies, officers, and instrumentalities.

Dated: May 31, 1977.

Respectfully submitted,

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(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
Ninth Circuit

No. 75-3813

State of California ex rel. C. B. Christensen, California Milk Producers Advisory Board & Cunningham & Walsh, Inc.,

Appellees,

vs.

Federal Trade Commission, Louis A. Engman, Paul Rand Dixon, Mayo J. Thompson, M. Elizabeth Hanford and Stephen Nye, and Daniel J. Hanscom,

Appellants.

[March 3, 1977]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: KOELSCH, GOODWIN and CHOY, Circuit Judges.

GOODWIN, Circuit Judge.

The Federal Trade Commission appeals a district court judgment which ordered the FTC to terminate,

for lack of jurisdiction, cease-and-desist proceedings challenging the advertising of milk in a manner which the FTC alleged to be deceptive.

The injunction rested on the proposition that the dairy industry's advertising program was not subject to FTC regulation because it was sanctioned by an instrumentality of the state of California. The district court held that *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), immunized the advertising program in substantially the same manner and for substantially the same reasons described by the Supreme Court in holding California raisin marketing practices immune from antitrust liability.

We express no opinion on the ultimate question of immunity under *Parker v. Brown* because we hold that judicial intervention in this case was premature. The appellees have failed to exhaust their administrative remedies. The district court's judgment must be vacated and the action dismissed.

On August 1, 1974, the FTC issued its complaint against the California Milk Advisory Board[1] and Cunningham & Walsh, Inc., an advertising agency.

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[1]The California Milk Advisory Board was created pursuant to the California Marketing Act of 1937, Cal.Food & Agr.Code §§ 58601-59293. The Act calls for the issuance of marketing orders by the Director of Food and Agriculture upon approval of the producers and handlers of that commodity which is its subject. Marketing orders can encompass a variety of activities including advertising programs. The Act also provides for an Advisory Board composed of producers of the subject commodity. The operations of the advisory boards are financed by a tax on the producers. The Milk Advisory Board was created by a marketing order for milk issued in 1969, which authorized, among other programs, an advertising campaign.

The complaint alleged that advertisements to the effect that milk was needed by or beneficial to everybody were false and deceptive in light of evidence that many individuals cannot tolerate milk in their diet.

On September 11, 1974, the Board, Cunningham & Walsh, and the State of California on behalf of its Director of Food and Agriculture sued in the district court to enjoin the FTC proceedings. In their complaint the plaintiffs alleged that the FTC had no jurisdiction to proceed against them because the Board in is a state agency and Cunningham & Walsh is the Board's agent. The plaintiffs relied on both the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, and the doctrine of *Parker v. Brown, supra.*

The district court granted a temporary restraining order and a preliminary injunction. After a hearing, the district court found that the FTC had no jurisdiction over the activity of the Milk Advisory Board, and that continued enforcement proceedings would irreparably harm the plaintiffs. Accordingly, the court denied the FTC's motion for summary judgment and granted the plaintiff's motion for summary judgment. The court made permanent its preliminary injunction.

A familiar rule of administrative law provides that judicial relief for a supposed or threatened injury does not become available until the prescribed administrative remedy has been exhausted. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938). The rule recognizes that

agencies are created to apply their statutory authority in the first instance and that considerations of agency expertise and efficiency counsel the courts not to interfere before the agency has acted. There are, however, cases in which agency preference is outweighed by other factors and the doctrine of exhaustion is not applied. *McKart v. United States,* 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969); *Downen v. Warner,* 481 F.2d 642 (9th Cir. 1973). The plaintiffs argue that this is such a case.

In *Lone Star Cement Corp. v. FTC,* 339 F.2d 505 (9th Cir. 1964), we adopted the standard formulated by Professor Kenneth Culp Davis in Volume 3 of his Administrative Law Treatise, § 20.03, at 69 (1958 ed.), for determining the circumstances in which a party can seek judicial relief from anticipated agency action. 339 F.2d at 510. *Lone Star Cement* established three key factors which should be weighed in considering the propriety of judicial intervention: extent of injury from pursuit of administrative remedy; degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction. 339 F.2d at 510.

The application of the *Lone Star* standard convinces us that no judicial intervention was warranted in this case.

I. *Extent of Injury*

Only a clear showing of irreparable injury from anticipated agency action will excuse the exhaustion of administrative remedies and permit judicial inter-

vention in the agency process. *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974); *Petroleum Exploration, Inc. v. Public Service Commission*, 304 U.S. 209, 58 S.Ct. 834, 82 L.Ed. 1294 (1938); *Sears, Roebuck & Co. v. NLRB*, 153 U.S.App.D.C. 380, 473 F.2d 91 (1972).

The injury which the plaintiffs allege they will suffer if the FTC proceedings run their course is the expenditure of funds for legal fees. But litigation expenses, however substantial and nonrecoverable, which are normal incidents of participation in the agency process do not constitute irreparable injury. *Myers v. Bethlehem Shipbuilding Corp., supra; Renegotiation Board v. Bannercraft Co., supra;* L. Jaffe, Judicial Control of Administrative Action 429 (1965). Even if the necessary costs will be paid by the public, litigation expense remains immaterial.[2]

No other injury which the FTC proceedings could inflict upon the plaintiffs appears to be of the sort that could not be redressed by judicial review of any final FTC order pursuant to 15 U.S.C. § 45(c) and (d).

II. *FTC Jurisdiction*

As a general rule, the agency should make the initial determination of its own jurisdiction. *FPC v.*

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[2]Plaintiffs claim as conservators of both FTC funds and funds of the state of California. Obviously, Congress has empowered the FTC to decide which actions are worthy of its attention. It is unclear whether the defense costs in this proceeding will be borne by the general funds of California or by the milk producers through a special tax designed to budget the Milk Advisory Board. For purposes of this appeal the distinction is irrelevant.

Louisiana Power & Light Co., 406 U.S. 621, 647, 92 S.Ct. 1827, 32 L.Ed.2d 369 (1972). The plaintiffs rely upon an earlier case holding that exhaustion is not required when the challenge to the proceedings is that the agency was acting outside of its statutory authority. *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958). In *Leedom*, the Supreme Court permitted review of a National Labor Relations Board certification order where the action of the NLRB was in clear defiance of the express provisions of 29 U.S.C. § 159(b)(1). *See also Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 74 S.Ct. 745, 98 L.Ed. 933 (1954), and *Skinner v. Eddy Corp. v. United States*, 249 U.S. 557, 39 S.Ct. 375, 63 L.Ed. 772 (1919), for the proposition that exhaustion of administrative remedies is not required when the challenge is to the agency's authority to act.

There is no need to reconcile these earlier decisions with equally venerable Supreme Court pronouncements such as *Myers v. Bethelehem Shipbuilding Corp., supra*, because more recent cases have limited their application to jurisdictional defects which are apparent on the face of the record. *See FPC v. Louisiana Power and Light Co., supra; Boire v. Greyhound Corp.*, 376 U.S. 473, 480, 84 S.Ct. 894, 11 L.Ed. 2d 849 (1964); *American General Insurance Co. v. FTC*, 496 F.2d 197 (5th Cir. 1974); *Coca Cola v. FTC*, 475 F.2d 299 (5th Cir.), *cert. denied*, 414 U.S. 877, 94 S.Ct. 121, 38 L.Ed.2d 122 (1973).

While we express no opinion on the merits of the jurisdictional question, we note that the question is a close one. There is not, certainly, the kind of clear

jurisdictional defect present here that was found in *Leedom v. Kyne* and its progeny. In the case before us, the FTC should have the opportunity to make the initial determination of its own jurisdiction.

We agree with *FTC v. Markin,* 532 F.2d 541 (6th Cir. 1976), and *FTC v. Feldman,* 532 F.2d 1092 (7th Cir. 1976), both of which found that a *Parker v. Brown* challenge to FTC proceedings was premature pending final agency action.

Primary jurisdiction in the agency makes sense in terms of both judicial economy and agency efficiency. If no cease-and-desist order is entered, the courts need never concern themselves with the jurisdictional issue. The same is true if the proceeding becomes moot because of voluntary conduct or the passage of time. Also of importance is the "avoidance of premature interruption of the administrative process." *McKart v. United States,* 395 U.S. at 193, 89 S.Ct. at 1662. Such interruptions undermine both the efficiency and the autonomy of the agency. They are justified only when it appears early and plainly that the agency is operating outside the scope of its authority.

III. *Involvement of Agency Expertise on the Question of Jurisdiction*

The question of the transferability of the *Parker v. Brown* antitrust immunity to deceptive advertising proceedings is strictly one of statutory interpretation. However, the requirement of exhaustion of remedies often applies as well to questions of law as to questions of fact. Courts should accord deference to an

agency's own construction of its authorizing statute when reviewing final agency action. *Udall v. Tallman,* 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); *American General Insurance Co. v. FTC, supra. See also Pepsico, Inc. v. FTC,* 472 F.2d 179 (2 Cir. 1972). *Contra, Jewel Companies, Inc. v. FTC,* 432 F.2d 1155 (7th Cir. 1970).

Here, the plaintiffs allege not only that *Parker v. Brown* immunity applies to FTC advertising proceedings but also that these plaintiffs automatically qualify for the immunity *Parker v. Brown* confers.

As was demonstrated by the Supreme Court in *Cantor v. Detroit Edison Co.,* ..... U.S. ....., 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), and *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed. 2d 572 (1975), a full factual development is an essential prerequisite for determining the *Parker v. Brown* issue. This need for a solid factual record; again, is a strong argument favoring adherence to the doctrine of exhaustion of administrative remedies. *McGee v. United States,* 402 U.S. 479, 91 S.Ct. 1565, 29 L.Ed. 2d 47 (1971).

Conclusion

Upon a review of the three factors set forth in *Lone Star Cement Co. v. FTC, supra,* we hold that the plaintiffs here have not shown that judicial interference is necessary. Therefore, the injunction entered by the district court against the FTC is vacated, and the cause is remanded with neither party to have costs in this court.

Vacated and remanded.

Appendix B

In the United States District Court for the Northern District of California

C-74-1927 RHS

State of California, *ex rel.* C.B. Christensen, Director of Food and Agriculture, et al., Plaintiffs,

vs.

Federal Trade Commission, et al., Defendants.

[Filed June 25, 1975]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This action is brought by the State of California on behalf of its Director of Food and Agriculture (a civil executive officer of the State); the California Milk Producers Advi[illegible]ry Board (established pursuant to the Californi[illegible]Marketing Act of 1937 [Cal. Food & Ag. Code §§58[illegible]-59293] to assist the Director of Food and Agricu[illegible]e in the administration of a marketing order, issued on October 8, 1969, for research, education, and promotion of market milk and dairy products in California); and Cunningham and Walsh, Inc. (an advertising agency which in all matters here involved, has acted as the agent of the

State). The defendant Federal Trade Commission (hereinafter FTC) is an independent agency of the United States Government, and the individual defendants in this action are the current members of the FTC and an administrative law judge thereof, who are sued solely in their official capacities.

2. On August 1, 1974, an administrative complaint was issued by the FTC, Docket No. 8988, naming as respondents the California Milk Producers Advisory Board and Cunningham and Walsh, Inc. In the FTC complaint certain advertisements promoting the sale of milk were alleged by the FTC to be false and misleading in violation of Sections 5 and 12 of the Federal Trade Commission Act (hereinafter, FTC Act). Plaintiffs here seek a permanent injunction and a declaratory judgment against the FTC's proceeding with its administrative complaint in Docket No. 8988, on the grounds that Congress has not granted the FTC jurisdiction over states, state agencies, state instrumentalities, or state officers acting in their official capacities.

3. On September 11, 1974, this Court granted a temporary restraining order enjoining the FTC from proceeding for a period of 10 days. A preliminary injunction was granted on September 23, 1974. Findings of fact and conclusions of law were filed on October 29, 1974.

4. Defendants have filed a motion to dismiss herein and, in the alternative, a motion for summary judgment. Plaintiffs have filed a cross-motion for summary judgment. Both plaintiffs and defendants have

filed lengthy affidavits and exhibits in connection with these motions which supplement the affidavits and exhibits filed in connection with the hearing on the preliminary injunction granted herein. Based on the affidavits and exhibits filed herein and the provisions of the California Marketing Act of 1937 [Cal. Food & Ag. Code §§58601-59293], the Court finds the facts set forth below are established and undisputed in this record.

5. The California Milk Producers Advisory Board is an instrumentality of the State of California established to assist and advise the Director of Food and Agriculture in fulfilling his statutory duties under the California Marketing Act of 1937. The Director of Food and Agriculture and the State of California are the real parties in interest herein. The advertising being challenged by the FTC in Docket No. 8988 is part of the marketing order of October 8, 1969, effectuated by the Director of Food and Agriculture, pursuant to the California Marketing Act of 1937, which specifically authorizes such advertising.

6. No facts have been adduced in this record to contradict the affidavit of Gordon B. Reuhl, dated March 13, 1975, which provides:

> "(5) With respect to the promotional activities of the Advisory Board, all budgets, programs, and specific advertising copy are recommended by the Board, to the Director of Food and Agriculture for his specific approval prior to their implementation. From time to time the Director has specifically disapproved certain promotional materials recommended by the Board. In such

cases, the proposed program or materials have not been used. In addition to requiring the approval of the Director of Food and Agriculture on all programs and materials, the Board has, since 1972, submitted all nutritional material to Dr. George Briggs of the University of California for his approval prior to the use of such material.

(6) In my capacity as Manager of the Board, I am required to submit all recommendations by the Board to the Director of Food and Agriculture of the State for his approval, and this procedure has been followed."

7. Cunningham and Walsh, Inc., at all times relevant herein, to the extent that it has participated in the creation, preparation, or dissemination of the advertised materials challengd by the FTC, has acted as the agent of the State.

8. The Court finds that there are no material issues of fact between the parties herein and that the aggregate effect of the delay, expense, and uncertainty which would result from resort to the administrative process herein would result in irreparable injury to plaintiffs herein, for which they would have no adequate remedy at law. The importance of the question presented relating to state-federal relations indicates that prompt judicial resolution of this jurisdictional dispute by the courts at this time is required.

Conclusions of Law

1. The jurisdiction of the FTC under the FTC Act extends to "persons, partnerships, or corpora-

tions" [15 U.S.C. §45(a)(6)]. The definition of corporation includes an "association, incorporated or unincorporated . . . which is organized to carry on business for its own profit or that of its members" [15 U.S.C. §44]. Neither the FTC Act nor its legislative history indicates that states, agencies, state instrumentalities, or state officers in their official capacities were intended by Congress to be included within the terms "persons, partnerships, or corporations."

2. The FTC Act was designed to supplement and bolster the Sherman Act, to stop in their incipiency acts and practices which, when full blown, would violate the Sherman Act [*FTC v. Motion Picture Adv. Co.*, 344 U.S. 392, 394-395 (1953)]. In view of the close relationship between the two Acts, the fact that action by states, state agencies, state instrumentalities, and state officers in their official capacity is not subject to the Sherman Act [*Parker v. Brown*, 317 U.S. 341 (1943); *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974)] indicates that it is not subject to the FTC Act either.

3. The FTC may not proceed against a private corporation—here, Cunningham and Walsh, Inc.—merely aiding the State in carrying out the conduct in question [*E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth.*, 362 F.2d 52, 56 (1st Cir. 1966)].

4. Ordinarily, courts won't interfere with an administrative agency until it has completed its action, and administrative remedies may not be by-

passed [*Borden, Inc. v. FTC,* 495 F.2d 785, 786-787 (7th Cir. 1974)]. However, the FTC here clearly lacks jurisdiction under the FTC Act over the State and the other plaintiffs, and there is no specialized administrative understanding required to determine that this is so, such as would be required to decide, for example, the factual question of whether a private entity was engaged in interstate commerce; this case involves only a question of statutory construction. For the foregoing reasons, requiring exhaustion of administrative remedies is inappropriate [see *Lone Star Cement Corporation v. FTC,* 339 F.2d 505, 510 (9th Cir. 1964); *Leedom v. Kyne,* 358 U.S. 184, 188-189 (1958)].

5. There are no material disputed issues of fact. Defendants' motions to dismiss and for summary judgment herein are denied. Plaintiffs' motion for summary judgment is hereby granted. Plaintiffs are entitled to a permanent injunction prohibiting defendants, their agents and employees, from proceeding further against plaintiffs in Docket No. 8988, presently pending before the FTC. Plaintiffs are further entitled to a declaratory judgment that the FTC has no jurisdiction to proceed against them under the FTC Act with respect to matters complained of by the FTC in Docket No. 8988. Judgment shall be entered accordingly. Costs shall not be assessed against defendants herein.

Dated: June 24, 1975

Robert H. Schnacke
United States District Judge

Appendix C

In the United States District Court
for the Northern District of California

C-74-1927 (RHS)

State of California, *ex rel.* C. B. Christensen, Director of Food and Agriculture, et al.,
Plaintiffs,
v.
Federal Trade Commission, et al.,
Defendants.

[Filed July 7, 1975]

FINAL JUDGMENT AND ORDER

This matter came on for hearing before the Court on May 9, 1975, upon defendant's motions for dismissal or, alternatively, for summary judgment and plaintiffs' cross motion for summary judgment. The Court has considered the several motions, the briefs and affidavits of the parties, the arguments of counsel and the Court's written findings of fact and conclusions of law filed October 29, 1974, in support of the preliminary injunction entered herein on September 23, 1974. Based upon the foregoing record, the Court has determined that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law.

It Is Therefore Ordered, Declared and Adjudged:

1. That defendants' motions to dismiss and for summary judgment herein are denied.

2. That plaintiffs' motion for summary judgment herein is granted.

3. That the Federal Trade Commission has no jurisdiction to proceed against plaintiffs under the Federal Trade Commission Act with respect to the matters complained of in the Federal Trade Commission proceeding designated as Docket No. 8988.

4. That the preliminary injunction, previously granted and issued by this Court on September 23, 1974, be, and hereby is, made permanent, and the defendants, their successors, agents, and employees, and all other persons in active concert and participation with them are hereby permanently enjoined and restrained from proceeding further against plaintiffs in Docket No. 8988, presently pending before the Federal Trade Commission.

5. That no costs shall be assessed against defendants. Dated at San Francisco, California, this 7th day of July, 1975.

.....

Clerk of the U.S. District Court
Northern District of California

Approved:

Robert H. Schnacke
United States District Judge

Approved at to Form:

California Milk Producers
Advisory Board and
Cunningham & Walsh, Inc.

By /s/ William A. Wineberg, Jr.
William A. Wineberg, Jr.
Broad, Khourie & Schulz

Evelle J. Younger
Attorney General
State of California

By /s/ Roderick Walston
Roderick Walston
Deputy Attorney General

James L. Browning

United States Attorney

By /s/ Paul J. Fitzpatrick
Paul J. Fitzpatrick
Assistant U.S. Attorney

Dated: June 30, 1975

Appendix D

FEDERAL TRADE COMMISSION ACT

September 26, 1914, c. 311, 38 Stat. 717

Section 5 (15 U.S.C. §45):

§ 45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the

interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided,

the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission

be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if sup-

ported by evidence, shall be conclusive and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

Jurisdiction of court

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Precedence of proceedings; exemption from liability

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

Service of complaints, orders and other processes; return

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy

thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The vertified return by the person so serving said complaint, order, or other process setting for the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

Finality of order

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

Same; order modified or set aside by Supreme Court

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in acordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; order modified or set aside by Court of Appeals

(i) If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; rehearing upon order or remand

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for

certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

Definition of mandate

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalty for violation of order; Injunction and other appropriate equitable relief

(l) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure

(m)(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1) of this section, each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo.

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court. Sept. 26, 1914, c. 311, § 5, 38 Stat. 719; Feb. 13, 1925, c. 229, § 2, 43 Stat. 939; Mar. 21, 1938, c. 49, § 3, 52 Stat. 111; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Mar. 16, 1950, c. 61, § 4(c), 64 Stat. 21; July 14, 1952, c. 745, § 2, 66 Stat. 632; Aug. 23, 1958, Pub.L. 85-726, Title XIV, § 1411, 72 Stat. 809; Aug. 28, 1958, Pub.L. 85-791, § 3, 72 Stat. 942; Sept. 2, 1958, Pub.L. 85-909, § 3, 72 Stat. 1750; June 11, 1960, Pub.L. 86-507, § 1(13), 74 Stat. 200; Nov. 16, 1973, Pub.L. 93-153, Title IV, § 408(c), (d), 87 Stat. 591, 592; Jan. 4, 1975, Pub.

L. 93-637, Title II, §§ 201(a), 204(b), 205(a), 88 Stat. 2193, 2200; Dec. 12, 1975, Pub.L. 94-145, § 3, 89 Stat. 801. 15 U.S. Code § 45.

Section 12 (15 U.S.C. § 52):

§ 52. Dissemination of false advertisements—Unlawfulness

(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in or having an effect upon commerce by any means, for the purpose of inducing, or which is likely to induce directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, or cosmetics.

Unfair or deceptive act or practice

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of section 45 of this title. Sept. 26, 1914, c. 311, § 12, as added Mar. 21, 1938, c. 49, § 4, 52 Stat. 114; Jan. 4, 1975, Pub.L. 93-637, Title II, § 201(c), 88 Stat. 2193. 15 U.S. Code § 52.